

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MARIO L. MUNIZ</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 214,052
<b>IBP, INC.,</b>	)	
Respondent	)	
Self-Insured	)	

**ORDER**

Claimant appealed the then Assistant Director Brad E. Avery's May 15, 1998, Award. The Appeals Board heard oral argument by telephone conference on January 13, 1999. Jeffery K. Cooper was appointed Appeals Board Member Pro Tem to serve in place of Appeals Board Member Gary M. Korte who recused himself from this proceeding.

**APPEARANCES**

Claimant appeared by his attorney, Derek R. Chappell of Ottawa, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Gregory D. Worth of Lenexa, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

**ISSUES**

The Assistant Director found claimant had injured his left upper extremity while employed by the respondent and awarded claimant a 12.5 percent permanent partial disability of the upper extremity as contained in the scheduled injury statute found at K.S.A. 44-510d(a)(13). Claimant contends the award should be 25 percent of claimant's left upper extremity based on the opinion of the independent medical examination physician, Lanny W. Harris, M.D. Claimant also contends his average weekly wage should be based on a six-day work week instead of the five-day work week as found by the Assistant Director.

Respondent argues that claimant's award should be limited to medical treatment because claimant's injury did not disable him for at least one week from earning full wages as provided for in K.S.A. 44-501(c) and interpreted by Boucher v. Peerless Products, Inc. 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996).

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds the Award should be affirmed.

The Appeals Board agrees with the Assistant Director's analysis of the evidence as set forth in the Award. The Appeals Board finds the Assistant Director's Award sets out findings of fact and conclusions that are accurate and supported by the record. It is not necessary to repeat those findings and conclusions in this Order. Therefore, the Appeals Board adopts those findings and conclusions as its own.

Specifically, the Appeals Board agrees with the Assistant Director's finding that since the respondent did not raise the Boucher defense before the close of the record, the issue was not before the Assistant Director for decision. Further, the Appeals Board will not consider the issue for the first time on appeal. See Arnold v. Meier's Ready Mix, Inc., Docket No. 205, 689 (November 1998).

In regard to claimant's average weekly wage, the Appeals Board agrees with the Assistant Director's analysis that although claimant testified he was expected to work on Saturdays, the payroll record submitted into evidence show he only worked 6.75 hours of overtime in the 10 week period before his accident. Additionally, claimant testified if he did work on a Saturday then he was off on Tuesday the following week. These facts fail to prove claimant had an expectation of working a six-

day work week instead of a five-day work week as found in Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Two physicians testified in regard to preexisting functional impairment and functional impairment resulting from claimant's work-related accident. Claimant's treating physician, orthopedic surgeon William O. Reed, Jr., M.D., testified by deposition on November 10, 1997. The Administrative Law Judge appointed orthopedic surgeon Lanny W. Harris, M.D., to perform an independent medical examination of claimant, and he testified by deposition on November 18, 1997. Both physicians are certified by the American Board of Orthopedic Surgeons for Surgery of the Hand.

On July 2, 1996, Dr. Reed performed operative arthroscopy on claimant's left elbow. He removed loose bodies and performed a partial synovectomy. In accordance with the AMA Guides, Dr. Reed opined that due to articular cartilage narrowing claimant had a 2 percent upper extremity permanent functional impairment rating. But Dr. Reed related all of the 2 percent rating to conditions which preexisted claimant's work-related accident.

Dr. Harris, however, found the claimant's left upper extremity had limited motion, medial collateral ligament laxity, and ulnar neuropathy all associated with claimant's accident at work. Based on those findings and utilizing the AMA Guides, Dr. Harris opined claimant's left upper extremity permanent function impairment was 25 percent. Dr. Harris acknowledged claimant had preexisting functional impairment before this accident but he could not quantify the amount of the preexisting functional impairment without additional medical records and other documentation.

The Assistant Director found both doctors' ratings should be given equal weight because of the uncertainty surrounding the extent of claimant's preexisting condition. The Appeals Board agrees with the Assistant Director. Both physicians are equally qualified to express their opinions on permanent impairment and both used the AMA Guides as mandated by K.S.A. 44-510e(a). The Appeals Board finds the appropriate functional impairment rating for claimant's left upper extremity is somewhere between Dr. Reed's 0 percent, because he attributed his 2 percent rating as preexisting, and Dr. Harris' 25 percent rating. Claimant is entitled to a 12.5 percent permanent partial disability of the left upper extremity as found by the Assistant Director.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that then Assistant Director Brad E. Avery's May 15, 1998, Award should be, and is hereby affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January 1999.

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BOARD MEMBER PRO TEM

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BOARD MEMBER

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BOARD MEMBER

c:     Derek R. Chappell, Ottawa, KS  
       Gregory D. Worth, Lenexa, KS  
       Brad E. Avery, Administrative Law Judge  
       Philip S. Harness, Director